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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 1175

GAMBOA, RODRIGUEZ, RIVERA & CO., INC.,
Petitioner,

versus

IMPERIAL SUGAR COMPANY,
Respondent.

PETITION AND BRIEF FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TO THE HONORABLE HARLAN FISKE STONE, THE CHIEF JUSTICE OF THE UNITED STATES, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner respectfully shows:

A.

Summary Statement of the Matter Involved

Petitioner a Filipino Corporation sued Hamburg-American Line for breach of contract and filed a libel in the United States District Court for the Southern District of

Florida and by Writ of Foreign Attachment levied upon the Hamburg's steamship "ARAUCA" found in that district.

The Respondent similarly sued and obtained jurisdiction over the Hamburg in the same Court and in the same manner.

In their respective libels petitioner and respondent each demanded, among other things, the return of the sum of $32,541.75, which had been wrongfully exacted by the carrier Hamburg for the carriage of five parcels of 1,000 tons each of sugar from the Philippines to the United States. The carriage of this sugar was in performance of a c. i. f. (cost, insurance and freight) contract under which the petitioner had sold said sugar to the respondent. The freight was not prepaid. The respondent was not immediately billed for and hence did not pay the full agreed purchase price. Instead of prepaying the freight, the petitioner deducted from its invoice to respondent the amount of freight which the respondent would pay at the bill of lading destination upon taking delivery of the sugar. The petitioner had made the freight engagements and all the arrangements for the transportation of the sugar and thereby became personally liable for the amount of freight to the carrier Hamburg.

The three vessels carrying these five 1,000 ton parcels of sugar interrupted their voyages short of destination on the outbreak of the war and took refuge respectively in various ports in Central and South America and Sumatra, as the terms of the respective bills of lading permitted them to do in such event, but without thereby earning the freight.

The respondent took delivery from the carrier Hamburg of said lots of sugar at the said ports of refuge except Sumatra and paid the agreed freight, which Hamburg wrongfully demanded as a condition of delivery.

As to the S/S "Wasgenwald" cargo at Sumatra, respondent declined to take up the documents, and the *petitioner* paid the freight and thus secured re-possession ot

the sugar (Rec. 137). Nevertheless, the lower courts have awarded the refund of this freight to the *respondent*, who never paid it in the first place.

As another element in its performance of the said c. i. f. contract, the petitioner, at or before the commencement of the voyages, had procured and paid for policies of marine and war risk insurance in customary form, including separate insurance of the amount of agreed freight, which policies it had endorsed and delivered to the respondent, covering all the said five cargoes and the freight thereon. Some of the policies were English.

In the course of the litigations, commenced respectively by the petitioner and the respondent, against the carrier Hamburg, as stated above, Hamburg settled and compromised certain of the claims asserted against it by the said libelants and as both petitioner and respondent claimed the identical amount of freight which the carrier had exacted, viz: $32,541.75, Hamburg under a stipulation entered into by all the parties paid the said sum into the Registry of the said District Court to be disposed of as remnants and surpluses in possession of the said Court, and at the same time and by another stipulation, the libels of the petitioner and the respondent were consolidated and were treated as asserting their respective claims to the sum of $32,541.75 on deposit in the Registry of the Court.

Jurisdiction of the Court was grounded on the action being in admiralty and hence within the exclusive jurisdiction of the United States District Court.

Trial, as usual in admiralty, was by the Court without a jury.

The trial Court awarded the sum in controversy to the respondent.

On appeal to the Circuit Court of Appeals for the Fifth Circuit, this judgment was affirmed (125 Fed. 2nd 970).

Reduced to its simplest terms, this is the situation which confronted the Circuit Court. Respondent owed $300,000. for sugar purchased from petitioner, c. i. f. Manila, for

shipment to Texas. Petitioner said to respondent: "Pay the purchase price by honoring my drafts for $267,500. and when the cargoes arrive at destination, pay me the balance of the purchase price by paying $32,500. to the carrier, which is the amount of freight I owe him." The carrier never completed the voyages but, nevertheless, wrongfully demanded the freight—wrongfully, because not earned. In four out of five instances, the respondent paid the carrier the unearned freight and in the case of the fifth cargo, the S/S "Wasgenwald", the petitioner paid the exaction. But carrier is not permitted to keep its illgotten gains. Both petitioner and respondent sue for the $32,500. freight, and quite unexpectedly, carrier, admitting its error, agrees to pay back the $32,500. of unearned freight. But to whom? To discharge its liability to each, it pays the money into Court.

Thus, money which the petitioner had normally authorized respondent to pay to the carrier as part of its purchase price is now refunded. Can there be any doubt that, being part of the purchase price, it belongs to the petitioner, the seller?

The question presented above, the Circuit Court of Appeals answered adversely to the petitioner.

We respectfully submit that this litigation is not merely a private controversy; the consequences of the decision below, if unreversed, are of at least as far-reaching importance to international commerce on c. i. f. terms, and to international marine insurance, and as novel and precedent-shattering in effect, as, in the field of seamen's injuries, was the case of

> *Jacob* v. *City of New York,* 62 Sup. Ct. 854, 314 U. S.—March 30, 1942

in which this Court reversed and remanded the cause after granting certiorari.

> 62 Sup. Ct. 117
> 314 U. S.—

B.

Reasons Relied on for the Allowance of the Writ.

In applying for a Writ of Certiorari to the Circuit Court of Appeals for the Fifth Circuit the petitioner invokes the discretion of this Court for the following special and important reasons:

1. That the Circuit Court of Appeals for the Fifth Circuit in determining to affirm the judgment of the District Court on the "principles of fair play" has so far departed from the accepted and usual course of judicial proceeding as to call for an exercise of this Court's power of supervision.

2. That in construing and interpreting the rights, duties and obligations of the buyer (respondent) and seller (petitioner) of a c. i. f. contract in international trade and commerce, the Circuit Court of Appeals for the Fifth Circuit has construed and interpreted the same in conflict with the interpretation and construction of a c. i. f. contract as determined by this Court in

> *Thames & Mersey Ins. Co.* v. *United States,* 237 U. S. 19

and hence has decided a Federal question in a way probably in conflict with applicable decisions of this Court.

3. That the Circuit Court of Appeals for the Fifth Circuit has decided an important question of Federal law which has not been, but should be, settled by this Court in that it has decided a question involving international trade and commerce involving foreign bills of lading and foreign marine and war risk insurance policies affecting the interests of a national of the Philippine Commonwealth in dis-

regard of an applicable precedent of the English Court of King's Bench

> *Finska Cellulosaforeningen* (*Finnish Cellulose Union*) v. *Westfield Paper Company, Ltd.*, King's Bench Division, November 13th-18th, 1940, 68 Lloyds List Law Reports 75, and not appealed

stating on the contrary that the question before the Court is without precedent.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, sitting at New Orleans, in the State of Louisiana, commanding that Court to certify and send to this Court, for review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the cause numbered and entitled on its docket as No. 9995, *Gamboa, Rodriguez, Rivera & Co., Inc., Appellant,* vs. *Imperial Sugar Company,* Appellee; and that said judgment of the District Court of the United States for the Southern District of Florida, may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just, and your petitioner will ever pray.

GAMBOA, RODRIGUEZ, RIVERA & CO., INC.,
Petitioner.

BY: ALFRED C. B. MCNEVIN,
of New York City,
Its Counsel.

Dated: April 7th, 1942.